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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. VINCENT JEFFREY NORWOOD, Defendant and Appellant.	B177171 (Los Angeles County Super. Ct. No. TA073481)

APPEAL from a judgment of the Superior Court of Los Angeles County. William Barry, Judge. Affirmed.

Sally P. Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Mary Sanchez and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

Vincent Norwood, also known as Vince Norwood, Vincent Brown and Victor Brown, appeals from a judgment entered upon his conviction by jury of three counts of attempted second degree robbery (Pen. Code, §§ 211/664).[1] The trial court found to be true allegations that appellant had suffered two prior felony strikes within the meaning of sections 1170.12 subdivisions (a) through (d) and 667, subdivisions (b) through (i), a prior serious felony within the meaning of section 667, subdivision (a) and had served two prior prison terms within the meaning of section 667.5, subdivision (b). The trial court sentenced appellant to an aggregate state prison term of 35 years to life. Appellant contends that (1) he was denied a fair trial by reason of the prosecutor's persistent use of leading questions, and (2) the trial court erred in instructing the jury in accordance with CALJIC No. 2.05.

We affirm.

FACTUAL BACKGROUND

The prosecution's case.

On February 8, 2004, at 4:30 p.m., appellant entered the Jack in the Box restaurant on Atlantic and Martin Luther King Boulevard, in Lynwood. Appellant had his hand under his sweater as if holding a weapon. He approached Rodolfo Venegas (Rodolfo), a cashier, and ordered him to, "Give me the money or I'll shoot." Rodolfo was frightened because he believed appellant had a gun. He testified that appellant's breath smelled of hard alcohol, but he was not slurring his words and did not appear intoxicated.

Appellant reached across the counter and began pressing the cash register buttons, but was unable to open the cash register. He then jumped across the counter, proceeded to the drive-through area and demanded money from Lucy Garcia (Lucy), a second cashier, who was carrying a cash drawer containing money.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Jacqueline Garcia (Jackie), the shift leader, was upstairs in the office. She saw appellant on the surveillance monitors touching the registers and talking to employees and went downstairs. She thought he had a gun and was frightened. She activated the panic button in the drive-through area, notifying the police. Jackie did not smell alcohol on appellant's breath, and he appeared to her to be sober.

When appellant removed his hand from his pocket, the employees saw that he was only holding a comb, and they tried to detain him. A struggle ensued. Appellant hit Rodolfo in the eye and struck Jackie on the back of the head. Appellant went over the counter and ran away. He did not take any money and never touched the cash drawers. Video equipment captured the incident, including appellant jumping over the counter and hitting the employees.

Los Angeles County Sheriff's Deputy Tri Hoang responded to the scene within four minutes of the incident. He interviewed the three Jack in the Box employees, all of whom seemed nervous and afraid. Fifteen minutes later, he learned that appellant had been apprehended. Deputy Hoang went to the location where appellant was detained and interviewed him 15 to 20 minutes after the incident, "periodically" for 10 to 15 minutes. Deputy Hoang did not believe appellant was intoxicated.

The defense's case.

Appellant, who had three prior felony convictions, testified that he and his friend Darlene Lavender had been drinking. He consumed four tall beers and a big bottle of Cisco. He was so intoxicated he had only a vague recollection of what happened at the Jack in the Box restaurant.

Investigator Peggy Foster interviewed Lavender. Lavender told her that she and appellant were intoxicated prior to the incident. They drank a couple of beers and bottles of Cisco. They were going to take a bus to get a room to be together, but the driver made them leave because they were being rowdy and did not have correct change. Lavender went inside the Jack in the Box restaurant to use the restroom while appellant waited outside. When she exited the restaurant, he entered to use the restroom. She waited for a

while, but appellant did not come out. Lavender then went to use the restroom for a second time, but it was locked and she could not get inside. She therefore urinated on the street, when police arrived and told her to put her hands up.

DISCUSSION

I. The prosecutor's use of leading questions did not prejudice appellant.

During the prosecutor's direct and redirect examination, he asked a series of questions, including the following that were objected to on the ground that they were leading:

Questions to Rodolfo:

1. "Q. Did [appellant] say something that led you to believe that he might have a gun? [¶] A. 'Give me the money or I'll shoot.' [¶] Q. He said, 'Give me,' I'm sorry. [¶] . . . [¶] A. He said, 'Give me money.' [¶] Q. Did he say something after that? [¶] A. Or he was going to shoot. [¶] Q. Did he actually say those words, 'or I'll shoot'? [¶] A. I don't know if he said it like that, but he said something like that. [¶] Q. Something to the effect of he'll shoot and he has a gun? [¶] A. Yes." The trial court overruled defense counsel's objection that the last question was leading.

2. "Now, after [appellant] jumped over the counter, did he continue to ask for money?" An objection by defense counsel that the question was leading was sustained by the trial court which instructed the prosecutor to be more direct.

3. "Q. Did he make any motion with his hands? [¶] A. No, he was just, he wanted the money. [¶] Q. And he specifically said what, again? [¶] A. 'Give me the money.' [¶] Q. And he said that in the direction of Lucy? [¶] A. Yes. [¶] Q. As she was holding the cash box?" The trial court sustained defense counsel's objection that the last question was leading.

Questions to Jacqueline:

1. "Q. And is it fair to say that dealing with these people, there's various levels of intoxication? [¶] A. Yes. [¶] Q. In other words, somebody can be a little bit drunk? [Defense Counsel:] I'm going to object as leading. [¶] [The Court:] Overruled."

2. "[The Prosecutor:] Q. Somebody can be a little bit drunk verses very drunk; is that fair to say? [¶] A. Yes. [¶] [Defense Counsel:] Objection, leading. Argumentative. [¶] [The Court:] Overruled."

3. "Q. There was a question that we went over—that [defense counsel] went over with you from the preliminary hearing and the question was: [¶] 'Is it true you thought he was probably high or drunk because he didn't seem injured by the blows?' [¶] And you answered: 'Yes.' Correct? [¶] A. Yes. [¶] Q. Okay. Now, you testified—are you answering yes for the fact that he seemed high or drunk or yes to the fact that he didn't seemed phased by the blows? [¶] [Defense Counsel:] I'm going to object as leading. [¶] [The Court:] Sustained."

Questions to Deputy Hoang:

1. "Q. [Appellant was] able to fill that out with no difficulty? [¶] A. No. [¶] Q. He gave an address, did he not? [¶] A. Yes." Defense counsel objected that the question was leading, which objection was sustained.

Appellant contends that the "unrelenting and persistent pattern of leading questions utilized by the prosecution throughout the trial on direct and redirect examination [was] error [and] was not harmless."[2] He argues that it is reasonably

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[2] Although appellant suggests that the prosecutor acted improperly in asking the leading questions, appellant does not cast this contention in the form of a prosecutorial misconduct claim and provides no authority on that theory. If appellant intended this claim to be one of prosecutorial misconduct, he waived it by failing to object on that ground and request an admonition in the trial court. (*People v. Jennings* (1991) 53 Cal.3d 334, 374.)

probable that he would have received a more favorable verdict because "the prosecution so relentlessly in the form of leading questions [coached witnesses] that it is difficult to speculate how much of the testimony was based on their recollection and how much was driven by the prosecution." He asserts that the error so infused the trial with unfairness that he was denied due process. This contention is without merit.

A "'leading question' is a question that suggests to the witness the answer that the examining party desires." (Evid. Code, § 764.) Such questioning may not be used on direct examination, except in special circumstances. (Evid. Code, § 767.) Trial courts have broad discretion to decide when special circumstances are present that justify asking leading questions of a witness. (*People v. Augustin* (2003) 112 Cal.App.4th 444, 449.) Further, a trial court has additional authority to "exercise reasonable control over the mode of interrogation of a witness so as to make such interrogation as rapid, as distinct, and as effective for the ascertainment of the truth." (Evid. Code, § 765.)

A review of the reporter's transcript of the trial in this matter and the questions to which appellant specifically refers on this appeal convinces us that the leading questions asked by the prosecutor were neither "unrelenting" nor "persistent," and certainly not such as to infect the trial with unfairness. It is inevitable that during any trial, counsel will occasionally ask leading questions. Neither the number nor the nature of those questions here was extreme enough to constitute coaching witnesses or to have deprived appellant of a fair trial.

For example, the question to Rodolfo, inquiring whether appellant's statement to Rodolfo was, "Something to the effect of he'll shoot and he has a gun," was simply a follow-up question, seeking clarification of Rodolfo's earlier answer as to what appellant told him. The question provided little information not contained or implied in Rodolfo's prior response. Similarly, the question to Rodolfo that appellant yelled at Lucy to give him the money, "As [Lucy] was holding the cash box," was a clarification of the previous testimony. The question to Jackie as to whether a person could be a little bit, versus very drunk, was merely a foundational question for her opinion as to the level of appellant's

intoxication. None of these questions introduced otherwise inadmissible evidence or put facts in witnesses' mouths to which their testimony had not already alluded.

The prosecutor's use of leading questions did not prejudice appellant, as it is not reasonably probable that appellant would have obtained a more favorable verdict had the leading questions not been asked. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Use of leading questions is not prejudicial misconduct in the absence of a showing that such examination had the effect of deliberately producing inadmissible evidence or calling for inadmissible or prejudicial evidence. (*People v. Hayes* (1971) 19 Cal.App.3d 459, 470.) There has been no showing that the evidence produced by the leading questions here was otherwise inadmissible. Additionally, the evidence against appellant was overwhelming. Two of the robbery victims identified appellant in court as the perpetrator, and he was depicted on a surveillance video introduced in evidence. In fact, appellant did not contest that he committed the robbery, but defended on the ground that he was too intoxicated to have formed the required specific intent. The evidence on that issue was also overwhelming. Rodolfo and Jackie testified that appellant did not act intoxicated, Rodolfo stating that appellant did not slur his words, was easy to understand, did not have an unsteady gate and jumped across the counter with little difficulty, as depicted in the surveillance video shown to the jury. Deputy Hoang, who had expertise in identifying intoxicated people, spoke with appellant for 10 to 15 minutes after his arrest and opined that appellant was not intoxicated.

II. The trial court erred in instructing the jury in accordance with CALJIC No. 2.05, but that error was harmless.

The trial court instructed the jury in accordance with CALJIC No. 2.05, as follows: "If you find that an effort to procure false or fabricated evidence was made by another person for the defendant's benefit, you may not consider that effort as tending to show the defendant's consciousness of guilt unless you also find that the defendant authorized that effort. If you find defendant authorized the effort, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to

decide. The People have the burden of proving beyond a reasonable doubt that the defendant authorized any such effort to procure false or fabricated evidence."

Defense counsel objected to the instruction, claiming that it suggested that there was fabrication, even though there was no evidence to support that point. He argued that the mere fact that the defense and the prosecution had different evidence with regard to the defendant's specific intent was not a basis for the instruction.

The prosecutor stated that he was "not in love with that instruction" and did not care if the trial court gave it. But he advised the trial court that he was going to argue that Lavender was lying on appellant's behalf. He claimed the instruction did not assist the prosecution, but was designed to help the defendant, informing the jury that it must find that Lavender's fabrication was authorized by appellant in order to conclude that it reflected consciousness of guilt.

The trial court indicated that it was going to add to the form CALJIC instruction that the People had the burden of proving that defendant authorized the efforts to procure false or fabricated testimony beyond a reasonable doubt. It gave the instruction because "it says that if the jury finds that there was an effort to procure false or fabricated evidence, so it's false not just fabricated, was made by another person for the defendant's benefit, it then tells them you may not consider that effort as tending to show the defendant's consciousness of guilt unless you also find that the defendant authorized that effort."

Appellant contends that the trial court erred in instructing the jury in accordance with CALJIC No. 2.05. He argues that, "There was absolutely no evidence that appellant had urged Ms. Lavender to fabricate evidence." While we agree with appellant that CALJIC No. 2.05 should not have been given, we find the error in doing so to have been harmless.

"'It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference.' [Citation.]" (*People v. Valdez* (2004) 32

Cal.4th 73, 137.) CALJIC No. 2.05 instructs the jury that when a third person seeks to procure false or fabricated evidence for the defendant's benefit, it may be considered to show the defendant's consciousness of guilt only if the third person's efforts were authorized by the defendant. (See *People v. Hannon* (1977) 19 Cal.3d 588, 599-600.) The instruction makes clear that in order for the jury to be entitled to draw the inference of defendant's consciousness of guilt from the third person's efforts, the jury must "also find that the defendant authorized that effort." (CALJIC No. 2.05.) The "mere relationship [between the defendant and the procurer of the evidence], of itself, has never been held sufficient" to establish that the third person is acting on behalf of the defendant or by the defendant's authorization. (*People v. Perez* (1959) 169 Cal.App.2d 473, 477-478.) Similarly, the mere opportunity to attempt to influence a victim is insufficient. (See *People v. Terry* (1962) 57 Cal.2d 538, 566.)

Here, there was not a scintilla of evidence that appellant authorized his girlfriend, Lavender, to testify falsely or to give the police a false statement regarding his intoxication, or that appellant did anything else to procure such evidence. There was no suggestion he had any conversations with Lavender regarding her testimony or what she should tell the police. There was merely a difference in evidence regarding appellant's state of intoxication which was not necessarily based on fabrication. Thus, CALJIC No. 2.05 was inappropriate.

The error in giving the instruction, however, was harmless for the reasons set forth in the preceding section. Further, CALJIC No. 2.05 was more beneficial than detrimental to appellant in that it instructed the jury that if it found that Lavender had given fabricated or false testimony, that could only be considered as evidence of appellant's consciousness of guilt if he authorized the conduct and that that evidence alone was insufficient to support a conviction. Additionally, the trial court instructed the jury in accordance with CALJIC No. 17.31, that not all of the instructions given were necessarily applicable. This informed the jury that CALJIC No. 2.05, and the inference of consciousness of guilt permitted by it, might not be applicable.

DISPOSITION

The judgment is affirmed.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST